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ANN BAVENDER\*  
ANNE GOODWIN CRUMP  
VINCENT J. CURTIS, JR.  
RICHARD J. ESTEVEZ  
PAUL J. FELDMAN  
ROBERT N. FELGAR\*  
ERIC FISHMAN  
RICHARD HILDRETH  
FRANK R. JAZZO  
ANDREW S. KERSTING\*  
EUGENE M. LAWSON, JR.  
HARRY C. MARTIN  
GEORGE PETRUTSAS  
LEONARD R. RAISH  
JAMES P. RILEY  
KATHLEEN VICTORY  
HOWARD M. WEISS  
\* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

www.fhh-telcomlaw.com

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

FRANK U. FLETCHER  
(1939-1985)  
ROBERT L. HEALD  
(1956-1983)  
PAUL D.P. SPEARMAN  
(1936-1982)  
FRANK ROBERSON  
(1936-1981)  
RUSSELL ROWELL  
(1948-1977)

RETIRED  
EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND  
INTERGOVERNMENTAL AFFAIRS  
SHELDON J. KRYSS  
U. S. AMBASSADOR (ret.)

OF COUNSEL  
EDWARD A. CAINE\*  
MITCHELL LAZARUS\*  
EDWARD S. O'NEILL\*  
JOHN JOSEPH SMITH

WRITER'S DIRECT

703-812-0440

lazarus@fhh-telcomlaw.com

August 5, 1998

**HAND DELIVERED**

Magalie R. Salas, Esquire  
Secretary  
Federal Communications Commission  
1919 M Street, NW, Room 222  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

**Re: 1998 Biennial Regulatory Review — Testing New Technology  
CC Docket No. 98-94**

Dear Ms. Salas:

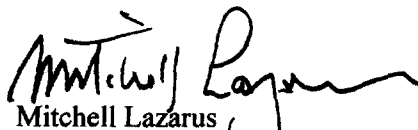
Enclosed are the original and 12 copies of Reply Comments of the Internet Service Providers' Consortium for filing in the above-referenced docket.

The additional copies and diskette specified in Paragraphs 36 and 39 of the Notice of Inquiry are referenced in the attached Certificate of Service.

Kindly date-stamp and return the extra copy of this cover letter.

If there are any questions about this filing, please call me at the number above.

Respectfully submitted,



Mitchell Lazarus  
Counsel for Internet Service Providers' Consortium

ML:deb

Enclosures

cc: Service List  
Ms. Deb Howard, ISPC  
Ms. Roxanna Loveday, ISPC  
Mr. Charles T. Smith, Jr., ISPC  
Kathryn A. Kleiman, Esq.

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ORIGINAL

Before the  
**Federal Communications Commission**  
Washington DC 20554

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AUG - 5 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

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CC Docket No. 98-94

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1998 Biennial Regulatory Review —

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Testing New Technology

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**REPLY COMMENTS OF THE  
INTERNET SERVICE PROVIDERS' CONSORTIUM**

Mitchell Lazarus  
FLETCHER, HEALD & HILDRETH, P.L.C.  
1300 North 17th Street, 11th Floor  
Arlington, VA 22209  
703-812-0440

Kathryn A. Kleiman  
INTERNET MATTERS  
P.O. Box 25876  
Alexandria, VA 22313  
703-518-5184

August 5, 1998

Counsel for the  
INTERNET SERVICE PROVIDERS'  
CONSORTIUM

Before the  
**Federal Communications Commission**  
Washington DC 20554

In the Matter of	)	
	)	CC Docket No. 98-94
1998 Biennial Regulatory Review —	)	
Testing New Technology	)	

**REPLY COMMENTS OF THE  
INTERNET SERVICE PROVIDERS' CONSORTIUM**

The Internet Service Providers' Consortium (ISPC) submits these Reply Comments in response to the Notice of Inquiry in the above-captioned proceeding.<sup>1</sup>

**A. ISPC Members Constitute a Vital Sector of the Internet Industry.**

The ISPC is the largest trade association for small to mid-size Internet Service Providers (ISPs) and other members of the Internet services industry.<sup>2</sup> ISPs provide retail-level, dial-up access to the Internet to anyone with a computer and a phone line. Without the ISPs, only businesses large enough to maintain their own networks could have Internet access. ISPs make the Internet universal and ubiquitous even for non-technical users.

Founded in 1996, the ISPC includes more than 220 company members, up 200 percent in the last year alone. ISPC members provide local and backbone Internet access, online content, and hardware and software for the industry. Members are headquartered in more than

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<sup>1</sup> 1998 Biennial Regulatory Review — Testing New Technology, CC Docket No. 98-94, Notice of Inquiry, FCC 98-118 (released June 11, 1998) ("Notice").

<sup>2</sup> Additional information about the ISPC is available at <http://www.ispc.org>.

42 U.S. states and 10 countries, with over 1 million subscribers in the aggregate. Most members serve local or regional markets, and increasingly specialize in services for specific industries.

Although the ISPC welcomes members regardless of size and geographic location, it has emerged as the voice for independent ISPs. These are ISPs *other than* carriers like the RBOCs, on-line content providers like AOL, and entities entangled with other interests, such as Microsoft Network.

Between 5,000 and 7,500 independent ISPs operate in the United States today. About 85% are small businesses, and about 85% of their customers in turn are also small businesses. The independent ISPs have average revenues of about \$375,000, and most have fewer than ten employees. Collectively, however, these providers account for 50 percent of the U.S. ISP market. They also create an increasing number of highly skilled technical positions in the United States and abroad.

The independent ISPs have helped to make the Internet the fastest-growing communications medium in the history of civilization. They contribute more than their share of the vitality and diversity that enables millions of people to use Internet daily to improve and enrich their lives.

**B. The RBOCs Have Every Economic Incentive to Misuse Their Facilities Monopoly Against Independent ISPs.**

The stunning success of the Internet is a product of competition. The Internet as we know it today would be unimaginable if a single company still provisioned both the country's telecommunications network and most of the equipment connected to it. Just three decades of

competition has produced dazzling combinations of new ideas, new technologies, and new services that never could have come from a monopoly provider.

Still, the large majority of users continue to access even the most innovative Internet services through monopoly-controlled facilities. An ISP needs multiple local loops for customers to dial in, and data lines for connection to the Internet backbone. Most ISPs do not have access to facilities-based CLECs, and so are wholly dependent on ILECs for their local loops and data lines.

All of the RBOCs are themselves in the ISP business, and compete with independent ISPs for the same retail Internet customers. The RBOCs thus have every incentive to use their facilities monopoly to discriminate against independent ISPs.

In the absence of appropriate regulation, it would be an easy matter for the RBOCs to exploit their monopoly position. An RBOC would only have to deny or delay service to independent ISPs. Or the RBOC could offer facilities inferior to those the RBOC uses for servicing its own ISP customers. Or the RBOC could overcharge for services that the RBOC provides at less cost to its own ISP operations. Any of these abuses, if applied systematically, would quickly cripple an independent ISP's ability to serve its customers, and convert those customers into ready prospects for the RBOC's own ISP operations.<sup>3</sup>

The main obstacle to the RBOCs' use of anticompetitive measures is the Commission's common carrier regulatory scheme. For that reason, the ISPC urges the Commission to move

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<sup>3</sup> Indeed, ISPC members report a growing catalog of just such abuses, which in fact are hindering the ability of some independent ISPs to add new subscribers.

with extreme caution in this proceeding. Given the fact of a facilities monopoly, a degree of regulation is needed to maintain a healthy competitive environment. Any deregulation to promote new technologies that does not also preserve opportunities for competition will be counterproductive.

**C. The RBOCs Propose Expansive "Trials" That Would Threaten Competition for Permanent Offerings.**

The RBOCs are not shy about attempting to leverage deregulated new-technology trials into deregulated long-term service offerings. SBC thinks such trials should not have any regulatory requirements other than size, reasonable notice to connecting carriers, and disclosure to participants, and that customers should remain connected when the trial is over.<sup>4</sup> Ameritech would have the Commission completely deregulate "the entire breadth of activities comprising new service development, testing, introduction, and deployment."<sup>5</sup> BellSouth argues that the Commission should deregulate not only trials of new technology, but also the commercial offering of services based on new technologies.<sup>6</sup> Further, says BellSouth, neither technical nor market trials should be subject to any FCC pre-approval or limitations on size or duration; and an RBOC should be able to carry over customers from the trial into the permanent offering.<sup>7</sup>

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<sup>4</sup> Comments of SBC Communications, Inc. at 2, 5.

<sup>5</sup> Comments of Ameritech at 3.

<sup>6</sup> Comments of BellSouth at 3-4. In this view, presumably the only services still subject to Title II regulation would be analog POTS.

<sup>7</sup> *Id.* at 4-6.

Bell Atlantic asks that trials of new technologies — and even new applications of existing technologies — not require any advance filings, approvals, price regulation, or network disclosures. Trials should be permitted for 18 months, and even longer if justified, with customers carried over into the eventual offering. And, according to Bell Atlantic, bundling of customer premises equipment and information services with telecommunications services should be permitted during both technical and market trials.<sup>8</sup>

For the Commission to grant these requests, without appropriate safeguards, would invite anticompetitive behavior on a large scale — especially as to services that an RBOC provides to both its own ISP service and to independent ISPs. If the requests were granted, the RBOC would be able to recruit customers for a new service without also making that service available to competing ISPs and their customers. But a "trial" that is effectively unlimited in size, scope, and duration is all but indistinguishable from the launch of a permanent offering. And, regardless of size and duration of the trial, allowing an RBOC to carry over customers to the permanent offering invites the RBOC to pick off the early-adopting customers while it still has exclusive access to the technology.<sup>9</sup>

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<sup>8</sup> Comments of Bell Atlantic at 2-8. Only U.S. West does not join the chorus for deregulation, but only because U.S. West denies the Commission has jurisdiction over either technical or market trials. Comments of U.S. West at 1-2. The sole exception U.S. West will grant is the case of a market trial of a new enhanced service in conjunction with a new basic telecommunications service, which U.S. West concedes is subject to the BOC Enhanced Services Market Trial Order, discussed below. *Id.* At 2-3.

<sup>9</sup> The Commission emphasizes that "the proposals discussed in this Notice are not intended to alter our rules for permanent authorization of new services or technologies." Notice at ¶ 9. A large, unregulated trial, however, has the same anticompetitive effect as an unregulated

Some of the commenters claim that deregulation of new offerings is necessary as an economic incentive for the development of new technologies.<sup>10</sup> They argue that competitors to the RBOCs are free to introduce new services without regulatory constraints, and so the RBOCs should have the same freedom. The argument would work better if the RBOCs and their competitors in fact were equally situated, apart from regulatory treatment. But they are not, of course, at least in the ISP industry. There, the RBOC still controls the facilities that its competitors need to deliver service. The RBOCs' requests for deregulation are an effort to restrict competition, not to make it fair.

In short, if the Commission permits the RBOCs to conduct technical and market trials without regulation or control, then a rational RBOC will label every new service or variation a "trial," introduce it on an exclusive and deregulated footing, continue it under "trial" status for as long as possible, and use the time to sign up the greatest possible number of customers.

By way of illustration, suppose that the RBOCs' requests in this docket had been granted in time for the introduction of xDSL, so that an RBOC could deem its xDSL launch to be a technology trial (or even a marketing trial).<sup>11</sup> Under our hypothetical, the trial status would

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permanent offering.

<sup>10</sup> *E.g.*, Comments of The United States Telephone Association at 3; Comments of BellSouth at 2-3 ("The incentive structure must be such that affected carriers have the promise of opportunity to reap the rewards of their innovation in the actual commercial introduction of services based on the new technology.")

<sup>11</sup> xDSL is a family of technologies that deliver high speed data access over conventional copper telephone lines. Its most common application is likely to be Internet access for consumers and small business, at downloads at speeds thirty times faster than conventional



relieve the RBOC of any unbundling or resale obligations under Section 251, and perhaps also free it from ONA requirements under *Computer III*. The RBOC could thus make xDSL available exclusively to the RBOC's own ISP operations, while denying it to customers of the independent ISPs. End users would then have a stark choice: 1.5 megabit access through the RBOC's ISP, or 56K through an independent ISP. All but the most casual users would likely move to the RBOC. When the end of the trial finally comes, and the independent ISPs gain access to xDSL, there will be few customers left to offer it to. And there still cannot be meaningful competition for the customers who signed on with the RBOC's ISP during the trial, because the inconvenience of changing email addresses, and the resulting costs in lost business, always create a strong incentive to stay with one's current ISP, even if another offers better terms.

Again, the xDSL example is hypothetical; the deregulation of xDSL is the subject of other proceedings.<sup>12</sup> We do not know what telecommunications technologies still lie over the horizon. We do know that an RBOC monopoly in those technologies, even temporarily, will distort the competitive market that is the seed-bed for further innovation.

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modems.

<sup>12</sup> See Petition of Bell Atlantic Corporation, CC Docket No. 98-11; Petition of U.S. West Communications, Inc., CC Docket No. 98-26; Petition of Ameritech Corporation, CC Docket No. 98-32; Petition of Southwestern Bell Telephone Co., et al., CC Docket No. 98-91.

**D. Even During Trials of New Technologies, RBOCs Must Make Available to Independent ISPs, on a Nondiscriminatory Basis, Any Services They Offer to Their Own ISP Operations.**

The only way to protect the competitive market for ISP services during RBOC trials of new technologies is to require the RBOCs to make available to independent ISPs, on a nondiscriminatory basis, any services they offer to their own ISP operations.

The issue can arise into two forms, depending on whether the new technology that forms the basis for the trial is a basic service or an enhanced service.<sup>13</sup> But the outcomes are similar in both cases.

The Commission has already confronted and resolved the issues that arise in trials of enhanced services. In the BOC Enhanced Services Market Trial Order,<sup>14</sup> the Commission permitted streamlined *Computer III* treatment of trials of new RBOC-provided enhanced services, subject to enumerated conditions. One of those conditions states:

Competing ESPs [enhanced services providers] must receive equal access, at equivalent prices, for all basic network services used in the trial.<sup>15</sup>

The conditions in the BOC Enhanced Services Market Trial Order are the minimum necessary to ensure that a competitive marketplace for the enhanced service still has a chance to exist

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<sup>13</sup> For purposes of this discussion, there is no material distinction between a basic service under *Computer III* and a telecommunications service under the 1996 Act, or between an enhanced service under *Computer III* and an information service under the Act.

<sup>14</sup> 4 FCC Rcd 1266 (1989).

<sup>15</sup> *Id.*, 4 FCC Rcd at 1272. A footnote adds, "BOCs should use reasonable means of providing notice to ESPs of proposed enhanced service trials such as publication of notices in major telecommunications trade publications." *Id.* (citation omitted).

following the trial. The Commission should maintain those conditions through the present proceeding.<sup>16</sup>

The other logical possibility concerns the trial of a new basic service, such as xDSL. The minimum condition here is identical in spirit, and almost identical in substance, to the one governing trials of enhanced services:

If an RBOC is using the basic service under trial to deliver an enhanced service (such as ISP service) to its own customers, then it must make the basic service available to competing providers on a nondiscriminatory basis.

With these conditions in place, technical and market trials of new technologies can meet the legitimate needs of the RBOCs without threatening the competitive marketplace for ISP services.

### **CONCLUSION**

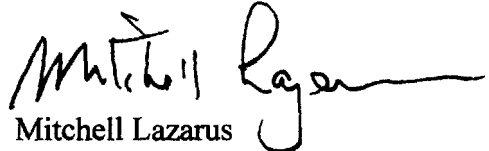
The RBOCs frame their requests for deregulated trials in terms of encouraging innovation and competition. In fact, however, some safeguards are necessary to prevent the

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<sup>16</sup> Bell Atlantic proposes to require that customers take all information services during a trial from the RBOC. Comments of Bell Atlantic at 6. Bell Atlantic's sole attempt at justification — that necessary changes to the telecommunications service could affect the information service — is unconvincing. This request seeks to undermine the two decades of progress since *Computer II*, and must be rejected.

misuse of trials to hinder competition. At the very least, the RBOCs should be required to make available to independent ISPs, on a nondiscriminatory basis, any services they offer to their own ISP operations, whether during a trial or as a permanent offering.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mitchell Lazarus". The signature is fluid and cursive, with the first name "Mitchell" written in a larger, more prominent script than the last name "Lazarus".

Mitchell Lazarus  
FLETCHER, HEALD & HILDRETH, P.L.C.  
1300 North 17th Street, 11th Floor  
Arlington, VA 22209  
703-812-0440

Of Counsel:  
Kathryn A. Kleiman  
INTERNET MATTERS  
P.O. Box 25876  
Alexandria VA 22313  
703-518-5184

August 5, 1998

Counsel for the  
Internet Service Providers' Consortium.

Certificate of Service

I, Mitchell Lazarus, an attorney with the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 5th day of August, 1998, I caused copies of the foregoing "Reply Comments Of The Internet Service Providers' Consortium" to be delivered by hand to the following:

Mr. William Kennard  
Chairman  
Federal Communications Commission  
1919 M Street, Room 814  
Washington, DC 20554

Mr. Harold W. Furchgott-Roth  
Commissioner  
Federal Communications Commission  
1919 M Street, Room 814  
Washington, DC 20554

Mr. Michael Powell  
Commissioner  
Federal Communications Commission  
1919 M Street, Room 814  
Washington, DC 20554

Ms. Susan Ness  
Commissioner  
Federal Communications Commission  
1919 M Street, Room 814  
Washington, DC 20554

Ms. Gloria Tristani  
Commissioner  
Federal Communications Commission  
1919 M Street, Room 814  
Washington, DC 20554

Ms. Kathryn C. Brown  
Chief  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, Room 500  
Washington, DC 20554

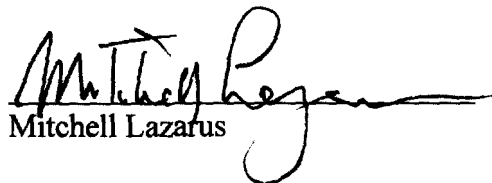
Mr. Peyton L. Wynns  
Chief  
Industry Analysis Division  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, Room 500  
Washington, DC 20554

Mr. Thomas J. Beers  
Deputy Chief  
Industry Analysis Division  
Common Carrier Bureau  
Federal Communications Commission  
2033 M Street, Room 500  
Washington, DC 20554

Mr. Scott K. Bergmann  
Industry Analysis Division  
Common Carrier Bureau  
Federal Communications Commission  
2033 M Street, Room 500  
Washington, DC 20554

Ms. Terry Conway  
(w/Diskette Submission)  
Industry Analysis Division  
Common Carrier Bureau  
Federal Communications Commission  
2033 M Street, Room 500  
Washington, DC 20554

International Transcription Services, Inc.  
2100 M Street, NW  
Suite 140  
Washington, DC 20037

  
Mitchell Lazarus